

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

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WIKIMEDIA FOUNDATION, :

:

Plaintiff :

:

versus : Civil Action No.

:

NATIONAL SECURITY AGENCY, : 15-cv-662

:

Defendant. : June 29, 2018

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The above-entitled Motion hearing was held before the Honorable T.S. Ellis, III, United States District Judge at the United States District Court Eastern District of Virginia - Alexandria Division.

A P P E A R A N C E S

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OFFICIAL COURT REPORTER: MS. TONIA M. HARRIS, RPR
United States District Court
Eastern District of Virginia
401 Courthouse Square, Fifth Floor
Alexandria, VA 22314

11:55:27

Tonia M. Harris OCR-USDC/EDVA 703-646-1438

P R O C E E D I N G S

11:55:27 1

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(Court proceedings commenced at 11:55 a.m.)

11:55:48 3

THE DEPUTY CLERK: 15-cv-662. Wikimedia versus

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National Security Agency, et al.

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May I have the appearances, please. First for the

11:55:53 6

plaintiff.

11:56:03 7

THE COURT: Take a minute. Who is here for the

11:56:07 8

plaintiff in the NSA Wikimedia case?

11:56:10 9

MS. GORSKI: Ashley Gorski, with the American Civil

11:56:13 10

Liberties Union, on behalf --

11:56:13 11

THE COURT: I'm sorry. Your last name again.

11:56:15 12

MS. GORSKI: Gorski, G-o-r-s-k-i.

11:56:18 13

On behalf of plaintiff Wikimedia Foundation. I'm

11:56:24 14

joined at counsel table by my colleague Patrick Toomey, also

11:56:27 15

of the American Civil Liberties Union. T-o-o-m-e-y. And Alex

11:56:33 16

Abdo of the Knight First Amendment Institute at Columbia

11:56:38 17

University.

11:56:38 18

THE COURT: All right. And who will argue today?

11:56:42 19

MS. GORSKI: I will, Your Honor.

11:56:43 20

THE COURT: All right. Thank you.

11:56:43 21

And who is here for the defendant?

11:56:48 22

MR. GILLIGAN: James Gilligan, Your Honor, with the

11:56:50 23

Department of Justice. With me at counsel table are my

11:56:52 24

colleagues Rodney Patton and Olivia Hussey Scott.

11:56:56 25

THE COURT: And who will argue today?

11:56:58 1 MR. GILLIGAN: I will, Your Honor.

11:56:59 2 THE COURT: All right. You may be seated.

11:57:03 3 Let me see. I think what we're here on is,
11:57:05 4 deceptively, the motion to compel, but it really involves a
11:57:14 5 good deal more than that. Some history needs to be repeated.

11:57:22 6 The gallery has emptied out fairly significantly.

11:57:28 7 All right. The case is here alleging violations of
11:57:37 8 the Fourth Amendment and other matters by the NSA and its
11:57:40 9 monitoring programs and efforts, but at the threshold there is
11:57:47 10 a standing dispute and a standing question.

11:57:55 11 And the parties -- as I recall, I gave the parties
11:57:56 12 an opportunity to conduct some discovery in order for the
11:58:01 13 standing issue to be presented.

11:58:05 14 And I'm going to ask you a question in a minute,
11:58:08 15 Ms. Gorski, but you may be seated if you wish.

11:58:15 16 And so, I think I allowed three or four months of
11:58:18 17 discovery. And then came a question in the course of
11:58:24 18 discovery that the government asserted the state secrets
11:58:36 19 privilege on, and they dotted the T's and crossed the I's to
11:58:42 20 assert that privilege. That is all of the authorities that
11:58:44 21 are required in order for a valid assertion of the privilege
11:58:49 22 of were their affidavits and their statements.

11:58:54 23 The real question presented is whether the state
11:58:58 24 secrets privilege survives the enactment of FISA. That's the
11:59:10 25 real question presented. If it does, then, of course, the

11:59:15 1 government's assertion of the state secrets privilege is
11:59:20 2 affected. If it doesn't, if FISA displaces it, then, as I
11:59:28 3 understand it, that would mean that whatever volume of
11:59:32 4 documents would be responsive to the interrogatory or request
11:59:38 5 for production that would be included in that interrogatory or
11:59:44 6 request for production, would be submitted in camera for the
11:59:48 7 Court's eyes only to review and determine whether or not this
11:59:55 8 was evidence that the plaintiffs had actually been surveilled
12:00:02 9 so that they could show an injury in fact.

12:00:06 10 I think that's generally what I understand to be
12:00:09 11 what's being presented today.

12:00:11 12 Am I correct, Ms. Gorski?

12:00:15 13 MS. GORSKI: Yes, Your Honor, with one
12:00:17 14 clarification. Should the Court conclude that the state
12:00:20 15 secrets privilege is not preempted by FISA it would still need
12:00:25 16 to undertake an assessment per the Fourth Circuit's decision
12:00:30 17 in *Abilt*, that the government has actually demonstrated a
12:00:33 18 reasonable danger of harm to national security through
12:00:36 19 disclosure of the information.

12:00:38 20 THE COURT: Now, how do I do that without examining
12:00:41 21 the affidavits? Or if I just examine the affidavits, they're
12:00:45 22 fairly conclusory on that point?

12:00:48 23 You don't need to answer that now. But it's an
12:00:52 24 obvious question, and it isn't answered by the Fourth Circuit.

12:00:55 25 But it seems to me that if you're going to undertake

12:00:57 1 that effort, you need to know what it is that is being
12:01:03 2 withheld. But we will cross that bridge only if and when we
12:01:07 3 need to.

12:01:09 4 You're the movant, and so I'll hear from you first
12:01:13 5 on the question whether FISA displaces the state secrets
12:01:17 6 privilege.

12:01:19 7 MS. GORSKI: Thank you, Your Honor.

12:01:20 8 FISA's procedures apply here for two reasons:
12:01:24 9 First, Congress displaced the state secrets privilege through
12:01:28 10 Section 1806(f). Congress spoke clearly, directly, and
12:01:32 11 unequivocally. When a party like Wikimedia seeks to discover
12:01:36 12 information related to FISA surveillance, that information
12:01:41 13 should be reviewed in camera, notwithstanding any other law.

12:01:45 14 This is because FISA was designed as a comprehensive
12:01:46 15 scheme to limit executive branch authority over electronic
12:01:49 16 surveillance and to subject that surveillance to judicial
12:01:52 17 review, including in cases like this one.

12:01:54 18 Second, although the government contends that
12:01:57 19 Wikimedia does not satisfy the statutory criteria in 1806(f),
12:02:03 20 the statute claiming --

12:02:03 21 THE COURT: I'm sorry. The statutory criteria and
12:02:04 22 what?

12:02:05 23 MS. GORSKI: In Section 1806(f), the relevant
12:02:08 24 statutory provisions.

12:02:09 25 The statute plainly applies here. Wikimedia is an

12:02:13 1 aggrieved person within the meaning of Section 1806(f) and
12:02:18 2 it's asking the Court to review the material in camera and ex
12:02:21 3 parte to determine whether the surveillance was lawfully
12:02:26 4 authorized and conducted.

12:02:27 5 Accordingly, Section 1806(f) applies, and the Court
12:02:31 6 should review the government's responses in camera.

12:02:34 7 And turning to elaborate on Congress's displacement
12:02:35 8 of the privilege, through Section 1806(f) Congress created
12:02:39 9 specific and detailed procedures for courts to apply when a
12:02:43 10 party like Wikimedia seeks information related to FISA
12:02:47 11 surveillance, and when the government asserts that disclosure
12:02:50 12 of that information would result in harm to national security.

12:02:52 13 In that situation, rather than excluding the
12:02:56 14 evidence from the case altogether, 1806(f) mandates in camera
12:03:01 15 review.

12:03:01 16 THE COURT: Can I stop you for just a moment here.

12:03:01 17 MS. GORSKI: Yes.

12:03:03 18 THE COURT: Because you're, I think, proceeding
12:03:07 19 logically through your argument. But at the outset, can you
12:03:11 20 tell me what case establishes the steps that a Court should
12:03:16 21 take in determining whether a statute, such as FISA, has
12:03:20 22 displaced the state secrets.

12:03:23 23 In other words, what are the analytical steps?

12:03:26 24 MS. GORSKI: Your Honor, when Congress speaks
12:03:29 25 directly to an issue of federal common law, Congress can --

12:03:34 1 can aggregate federal common law, and the state secrets
12:03:38 2 privilege is grounded in federal common law.

12:03:40 3 Congress has also occupied the field through its --

12:03:42 4 THE COURT: What cases would you chiefly rely on for
12:03:44 5 that overriding principle?

12:03:46 6 MS. GORSKI: *City of Milwaukee* is one of the cases
12:03:49 7 that we would rely on for that principle, Your Honor.

12:03:52 8 THE COURT: All right. Go on. All right. You can
12:03:54 9 go back now to your argument about why you think the
12:03:58 10 provisions of FISA are adequate to displace the state secrets
12:04:02 11 privilege.

12:04:03 12 MS. GORSKI: By mandating in camera review, 1806(f)
12:04:09 13 forecloses the government's ability to assert the state
12:04:12 14 secrets privilege or to rely on the state secrets privilege to
12:04:15 15 exclude the information from the case. And this also confirms
12:04:17 16 not only by the text of the statute, but by the structure and
12:04:21 17 the legislative history of FISA.

12:04:23 18 In the 1970's, the Church Committee, after
12:04:25 19 uncovering a long history of executive branch surveillance
12:04:28 20 abuses, recommended substantial surveillance reform. It
12:04:31 21 recommended that Congress implement civil remedy, and it
12:04:35 22 recommended discovery procedures to facilitate civil
12:04:38 23 litigation.

12:04:39 24 Shortly thereafter, Congress enacted FISA. It
12:04:41 25 implemented that civil remedy in Section 1810 of 50 U.S.C.

12:04:48 1 1810, and it also, through 1806(f), specified the particular
12:04:52 2 procedures to apply when civil litigants seek to discover
12:04:56 3 information related to FISA surveillance, and when they are
12:04:56 4 aggrieved persons.

12:05:00 5 And 1806(f) reflects the balance that Congress
12:05:02 6 struck between safeguarding sensitive executive branch
12:05:06 7 information and ensuring that civil litigants have an actual
12:05:10 8 and meaningful opportunity to pursue these remedies.

12:05:12 9 In the 2008 decision in the *In re NSA Telcoms* case
12:05:21 10 here is instructive. There, the courts have thoroughly
12:05:26 11 assessed the arguments that the government raises here.

12:05:29 12 THE COURT: Is this a California case?

12:05:31 13 MS. GORSKI: It is one of the California cases, Your
12:05:34 14 Honor.

12:05:34 15 THE COURT: So it is a district court case?

12:05:34 16 MS. GORSKI: It is a district court case.

12:05:36 17 THE COURT: Did it go to the Ninth Circuit?

12:05:38 18 MS. GORSKI: The case was up and down several times,
12:05:40 19 Your Honor.

12:05:40 20 THE COURT: Was this issue up?

12:05:42 21 MS. GORSKI: When the preemption issue was up before
12:05:46 22 the Ninth Circuit, the Ninth Circuit remanded for the district
12:05:48 23 court to asses this question.

12:05:51 24 THE COURT: Has it been back on that issue?

12:05:54 25 MS. GORSKI: Not on that precise --

12:05:56 1 THE COURT: I just want to be clear that the only
12:05:58 2 authorities we have are two district court cases, but no
12:06:04 3 circuit court cases.

12:06:05 4 MS. GORSKI: Yes, Your Honor, on this precise
12:06:07 5 question.

12:06:08 6 THE COURT: Go ahead. That doesn't mean that
12:06:10 7 district courts didn't resolve it correctly, but it always
12:06:14 8 helps to have a circuit opinion.

12:06:19 9 MS. GORSKI: And, Your Honor, turning now to the
12:06:22 10 statutes requirements, Wikimedia satisfies them. Wikimedia is
12:06:26 11 an aggrieved person. Section 1801 of FISA makes clear that
12:06:32 12 persons are aggrieved if their communications are subject to
12:06:35 13 FISA surveillance.

12:06:37 14 Wikimedia has set forth specific highly detailed
12:06:40 15 factual allegations explaining how its communications are
12:06:44 16 subject to the surveillance at issue. The Fourth Circuit
12:06:46 17 deemed those allegations plausible. Wikimedia survived a
12:06:49 18 motion to dismiss. And now, Wikimedia is entitled to
12:06:52 19 discovery, and it is entitled to the procedures in Section
12:06:55 20 1806(f).

12:06:57 21 THE COURT: Just out of curiosity, wouldn't your
12:07:01 22 desire to access these documents exist even if I were to find
12:07:05 23 standing based only on the particularized allegations you've
12:07:11 24 already made?

12:07:12 25 MS. GORSKI: Yes, Your Honor. Because the Court

12:07:16 1 bifurcated the standing and merits questions, Wikimedia would
12:07:21 2 still seek the opportunity to seek some discovery related --

12:07:25 3 THE COURT: Because that clearly would be relevant
12:07:27 4 to your merits, I take it.

12:07:29 5 MS. GORSKI: Much of the discovery related to
12:07:30 6 standing is also relevant to the merits because the issues are
12:07:33 7 intertwined. However, there would potentially still be other
12:07:39 8 discoveries, much smaller amounts, that Wikimedia would seek
12:07:41 9 relevant to the merits questions.

12:07:43 10 THE COURT: All right. Go on.

12:07:45 11 MS. GORSKI: The government contends that the only
12:07:47 12 individuals who are aggrieved are those who receive notice
12:07:50 13 from the government of that status, but this argument is at
12:07:53 14 odds with the plain text of 1806(f), which requires in camera
12:07:58 15 review in three situations, and including situations other
12:08:02 16 than when the government provides notice.

12:08:04 17 1806(f) provides written camera review when the
12:08:09 18 government provides notice to a defendant, when a defendant
12:08:14 19 seeks to move to suppress information obtained or derived from
12:08:18 20 FISA surveillance, regardless of whether that defendant has
12:08:21 21 received notice, and in the third situation, when an aggrieved
12:08:23 22 person makes any other motion to discover information related
12:08:28 23 to FISA surveillance.

12:08:30 24 What the government is seeking to do here is to
12:08:34 25 retain unilateral control over who can utilize these

12:08:39 1 procedures in 1806(f). And if the government were correct
12:08:40 2 that the aggrieved person status is predicated on notice, it
12:08:44 3 would effectively nullify in camera review under 1806(f), and
12:08:50 4 it would severely undermine FISA's civil remedy in Section
12:08:54 5 1810.

12:08:54 6 The government's arguments is also at odds with
12:08:55 7 other provisions of FISA, specifically Sections 1806(f) -- I'm
12:09:01 8 sorry, Section 1806(c) and (d). Those are FISA notice
12:09:05 9 provisions, and they contemplate that notice is provided to an
12:09:09 10 aggrieved person, not that notice is a precondition to
12:09:12 11 aggrieved person status.

12:09:13 12 I would also note that one of the district courts
12:09:16 13 that we've discussed, in 2009, the Court in *In Re NSA Telcom*
12:09:21 14 considered and expressly rejected the notion that aggrieved
12:09:25 15 person status is predicated on notice. There, it concluded
12:09:29 16 that the plaintiff's specific nonconjectural allegations were
12:09:32 17 sufficient for it to proceed as an aggrieved person under
12:09:35 18 Section 1806(f).

12:09:37 19 The government also contends that the Court is not
12:09:41 20 reviewing this information to determine whether the
12:09:44 21 surveillance was lawfully authorized and conducted, and
12:09:48 22 accordingly, the statute, in the government's view, does not
12:09:50 23 apply. But this is plainly a review for lawfulness.

12:09:54 24 As the Court has recognized, the standing and merits
12:09:56 25 issue here are closely intertwined. Standing, logically, is a

12:09:59 1 part of a lawfulness determination. And most fundamentally,
12:10:03 2 it cannot be the case that simply because the government has
12:10:06 3 sought to bifurcate these proceedings, as a matter of judicial
12:10:10 4 economy, that 1806(f) is now unavailable to plaintiff.

12:10:14 5 I would also note that the Court's ruling on
12:10:19 6 standing need not disclose any sensitive or harmful
12:10:24 7 information, and this is for several reasons.

12:10:26 8 First, the Court will have available to it a pool of
12:10:29 9 evidence, public evidence, and evidence that its reviewing in
12:10:33 10 camera, and its opinion need not reveal the contents of any
12:10:36 11 particular piece of evidence that it's reviewing.

12:10:39 12 Second, neither Wikimedia nor the public knows
12:10:40 13 exactly what evidence the government possesses in response to
12:10:43 14 any particular requests which creates even more opacity around
12:10:49 15 the in camera review process.

12:10:51 16 And third, and perhaps most importantly, the legal
12:10:55 17 standard governing the standing inquiry confirms that the
12:10:57 18 Court need not disclose sensitive information by ruling on
12:11:01 19 Wikimedia's standing, and that's because the standard is
12:11:03 20 substantial risk. The Court need not conclude that Wikimedia
12:11:07 21 was definitely subject to surveillance in the past, or that
12:11:09 22 Wikimedia definitely will be subject to surveillance in the
12:11:12 23 future.

12:11:12 24 The question is whether there's a substantial risk
12:11:15 25 of surveillance of Wikimedia's voluminous communications, more

12:11:19 1 than a trillion communications each year with users in
12:11:23 2 virtually every country on earth. And I would also note that
12:11:25 3 the government's declarations describe many harms that would
12:11:30 4 result from disclosure of the information at issue. But even
12:11:35 5 if those harms were to result from disclosure to plaintiffs,
12:11:43 6 they cannot prevent disclosure to the Court.

12:11:46 7 To the contrary, that is exactly the scenario that
12:11:47 8 Section 1806(f) contemplates. And when an aggrieved person,
12:11:53 9 like Wikimedia, seeks to discover FISA-related material,
12:11:55 10 1806(f) applies, and that material must be reviewed in camera.

12:11:59 11 I would like to touch briefly on some of the
12:12:02 12 practical matters that the Court may be considering.
12:12:06 13 Plaintiff, of course, urges the Court to grant the motion to
12:12:10 14 compel. Once it does so, it's free to prioritize and
12:12:14 15 structure its review in the way that makes the most sense. I
12:12:17 16 would assume beginning with the Wikimedia's specific discovery
12:12:21 17 requests. We think it's very likely that the Court can
12:12:23 18 resolve this question on the basis of a small handful of
12:12:26 19 documents.

12:12:28 20 THE COURT: All right. Thank you.

12:12:31 21 MS. GORSKI: Thank you.

12:12:34 22 THE COURT: For the government.

12:12:39 23 MR. GILLIGAN: Your Honor, I'm taking my cue from
12:12:43 24 what you said at the outset of this hearing. I will address
12:12:47 25 first the issues under Section 1806(f).

12:12:50 1 I just would like to say that we believe that the
12:12:57 2 declarations we've submitted, in particular the classified
12:12:58 3 declaration by the deputy director of the NSA, which is some
12:13:04 4 60 pages long, provides a great deal of information about why
12:13:07 5 the discovery that plaintiff is seeking in the disclosure of
12:13:16 6 the information they are trying to compel the government to
12:13:19 7 produce, would be extraordinarily harmful to national
12:13:21 8 security.

12:13:22 9 We believe that it certainly meets the standard set
12:13:25 10 forth in the *Reynolds* case, which is a reasonable danger that
12:13:30 11 compulsion of the evidence would reveal matters involving
12:13:35 12 diplomatic and military affairs that ought not be revealed.

12:13:39 13 Those judgments also under the standards --

12:13:39 14 THE COURT: I was pleased to see that the *Reynolds*
12:13:42 15 case is still cited. I remember -- didn't the *Reynolds* case
12:13:51 16 arrive in the '40s?

12:13:51 17 MR. GILLIGAN: 1953, Your Honor, as I recall.

12:13:55 18 THE COURT: 1953. It involved -- I'm trying to
12:13:57 19 remember the type of aircraft it involved.

12:14:00 20 MR. GILLIGAN: It was a military aircraft of some
12:14:04 21 sort, I believe, Your Honor. It certainly had military
12:14:05 22 equipment on it.

12:14:06 23 THE COURT: So 60-plus years later, it still has
12:14:11 24 some vitality, you think?

12:14:14 25 MR. GILLIGAN: Oh, absolutely. It's --

12:14:17 1 THE COURT: All right. Let's go on.

12:14:20 2 MR. GILLIGAN: If there is --

12:14:22 3 THE COURT: I was just remembering because *Reynolds*
12:14:24 4 was a big deal when I was a very young lawyer.

12:14:29 5 MR. GILLIGAN: It is still the wellspring of this
12:14:31 6 state secrets doctrine today, Your Honor.

12:14:32 7 THE COURT: But it's a reminder of how old I am.
12:14:35 8 The type of aircraft involved in that, you can only find in
12:14:40 9 museums.

12:14:42 10 It's an interesting recollection, but I'm familiar
12:14:45 11 with *Reynolds*. Go on.

12:14:50 12 MR. GILLIGAN: Okay. Just to wrap up the point,
12:14:51 13 Your Honor, if there is any concern in the Court's mind about
12:14:54 14 the adequacy of our assertion of the state secrets privilege,
12:14:57 15 we would like to address that.

12:14:57 16 THE COURT: No, as I said at the outset, I think you
12:15:02 17 have dotted the I's and crossed the T's required to assert the
12:15:08 18 state secrets privilege.

12:15:10 19 The question is whether the state secrets privilege
12:15:16 20 has been superseded by FISA.

12:15:23 21 That's the question, isn't it?

12:15:23 22 MR. GILLIGAN: If that's the question on the Court's
12:15:25 23 mind, then I will address --

12:15:27 24 THE COURT: Well, do you agree that that's the
12:15:29 25 question?

12:15:29 1 MR. GILLIGAN: That's the question that the
12:15:31 2 plaintiffs have put at issue, yes.

12:15:33 3 THE COURT: All right. Now, tell me why you think
12:15:34 4 the state secret remains available to the government in the
12:15:40 5 face of FISA.

12:15:42 6 MR. GILLIGAN: Well, because, Your Honor, even if
12:15:45 7 the -- even if this provision of FISA Section 1806(f) did
12:15:52 8 displace the state secrets privilege in proceedings to which
12:15:55 9 it applies, a conclusion that we contest, but even just
12:16:00 10 assuming for the sake of argument that it did displace, in
12:16:03 11 proceedings to which it applies, this is not such a
12:16:06 12 proceeding.

12:16:06 13 This -- the statute says that when the government
12:16:09 14 seeks to use evidence derived from electronic surveillance
12:16:15 15 against an aggrieved party, a defined term under FISA, and by
12:16:20 16 its expressed terms, the statute authorizes in camera review
12:16:23 17 of materials related to the electronic surveillance for the
12:16:27 18 purpose of determining the legality of the surveillance.

12:16:30 19 That is not the determination that the plaintiff is
12:16:33 20 asking you to make with review of the evidence that it wishes
12:16:36 21 us --

12:16:37 22 THE COURT: Isn't standing part of the legality
12:16:41 23 determination?

12:16:42 24 MR. GILLIGAN: I think, Your Honor, that, no, it is
12:16:43 25 not. Standing the merits are fundamentally different

12:16:46 1 inquiries. A determination outstanding to challenge a
12:16:50 2 defendant's conduct does not inform whether the defendant's
12:16:54 3 conduct was legal or not.

12:16:56 4 It only tells us whether the plaintiff has a right
12:16:58 5 to seek that determination of legality one way or the other.
12:17:03 6 They are entirely separate questions.

12:17:06 7 The fact that certain evidence may be relevant to
12:17:10 8 both questions, standing and the merits, doesn't make a
12:17:14 9 difference because the only determination for which the
12:17:19 10 statute authorizes in camera review of classified evidence is
12:17:24 11 the determination of the legality of the challenge conduct.

12:17:29 12 We're dealing here with a separate question, which
12:17:32 13 is whether or not the plaintiff is actually an aggrieved
12:17:36 14 person. That is to say, a target or subject to surveillance
12:17:39 15 who would have standing to challenge that conduct. That is
12:17:43 16 not the determination that the statute says, in expressed
12:17:47 17 terms, in camera review is authorized for. It is only
12:17:51 18 authorized for the determination of legality.

12:17:54 19 Plaintiff may have adequately alleged its standing,
12:17:57 20 that is, the holding of the Fourth Circuit in this case, but
12:18:00 21 now the plaintiff is attempting to prove that. And the
12:18:06 22 procedures authorized under Section 1806(f) were established,
12:18:13 23 again by the statute's plain terms, only for the purpose of
12:18:17 24 determining whether -- approving whether or not the alleged
12:18:22 25 surveillance was legal or not, not whether a particular party

12:18:25 1 was subject to that surveillance.

12:18:28 2 There's a third reason why this statute doesn't
12:18:31 3 apply here, Your Honor, although we think -- just to be clear,
12:18:37 4 this entire discussion, seems to us, can end simply by looking
12:18:44 5 at the statute's expressed instruction that the proceeding
12:18:48 6 authorizes for the purpose of determining legality. That is
12:18:51 7 not what this proceeding is about. We think that that
12:18:54 8 discussion can end there.

12:18:56 9 But there is the further point, in terms of the
12:19:00 10 statute's applicability, that the statute was intended to
12:19:06 11 apply in situations where it is the government that is seeking
12:19:10 12 to use surveillance-based evidence against an opposing party,
12:19:15 13 and not in situations where it is a plaintiff that wishes to
12:19:18 14 use classified information for purposes of its case.

12:19:22 15 That is so, we think, for the following reasons. As
12:19:29 16 Ms. Gorski was saying, the statute provides for three
12:19:33 17 situations in which it applies. When the government gives
12:19:38 18 notice of an intent to use surveillance-based evidence in a
12:19:43 19 proceeding against an opposing party -- it could be criminal,
12:19:47 20 it could be civil, there's -- it applies where an aggrieved
12:19:52 21 party moves to suppress evidence, surveillance-based evidence
12:19:57 22 that the government intends to use, and then there's the
12:20:00 23 catchall clause that the plaintiff relies on here, which says
12:20:04 24 that the procedure can apply when an aggrieved person moves
12:20:08 25 under any other statute or rule to obtain materials related to

12:20:13 1 electronic surveillance.

12:20:14 2 We submit that this third catchall phrase for
12:20:20 3 motions made under any statute or rule does not authorize the
12:20:23 4 kind of in camera proceeding that the plaintiff envisions
12:20:26 5 here, because, as I said, it is the plaintiff that is seeking
12:20:29 6 to use classified evidence for its purposes, not the
12:20:33 7 government that proposes to use classified evidence in a case,
12:20:37 8 surveillance-based evidence.

12:20:39 9 Because if this language were taken literally to
12:20:42 10 mean any type of motion authorizes the use of this procedure,
12:20:48 11 that it would render the references in the statute to the
12:20:52 12 earlier sections concerning governmental notification and a
12:20:58 13 plaintiff's motion to suppress entirely meaningless and
12:21:04 14 superfluous, and it would expand the reach of the statute to
12:21:08 15 situations where in camera review of the evidence would not be
12:21:12 16 a way of protecting classified information from disclosure,
12:21:16 17 but contrary to Congress's purposes when it enacted this
12:21:20 18 provision, it would actually result in the harmful disclosure
12:21:26 19 of classified information by identifying targets and subjects
12:21:30 20 of government's surveillance.

12:21:33 21 So we submit that to avoid this result, the statute
12:21:36 22 should be construed in accordance with the well-known
12:21:42 23 statutory maximum that general words following specific words
12:21:48 24 in a statute should be construed to embrace only similar items
12:21:54 25 to those enumerated by the specific terms.

12:21:57 1 And applying this canon to Section 1806(f), the
12:22:02 2 scope of the residual phrase that plaintiffs is relying on
12:22:05 3 here can properly be understood by reference to the enumerated
12:22:10 4 categories rather than adopting an interpretation under which
12:22:14 5 the enumerated categories are rendered meaningless and the
12:22:18 6 tail of the statute winds up wagging the dog.

12:22:21 7 That's the approach, the interpretive approach,
12:22:25 8 taken by the Supreme Court in such cases as *Gustafson*, which
12:22:30 9 is cited in the plaintiff's reply brief, as well as by the
12:22:34 10 Supreme Court in *Circuit City Stores*.

12:22:37 11 THE COURT: There's a Latin principle that describes
12:22:42 12 that to shy away from it.

12:22:43 13 MR. GILLIGAN: I was trying not to have to pronounce
12:22:45 14 that, Your Honor.

12:22:46 15 It is as ejusdem generis and noscitur a sociis.

12:22:54 16 THE COURT: That's correct. But if you've gone to
12:22:55 17 law school as long ago as I did, it would have a familiar ring
12:23:00 18 to you.

12:23:00 19 All right. Thank you. I understand the
12:23:03 20 government's argument and I understand Wikimedia's argument.

12:23:08 21 MR. GILLIGAN: Your Honor, may I simply address the
12:23:10 22 point that the statute doesn't apply here principally because
12:23:15 23 we're not talking about a determination --

12:23:18 24 THE COURT: Pretty central point to the motion to
12:23:20 25 compel and the assertion of the state secret privilege.

12:23:23 1 MR. GILLIGAN: It is very central, Your Honor. And
12:23:26 2 we think that again --

12:23:26 3 THE COURT: What else do you want to -- I don't have
12:23:28 4 much time.

12:23:29 5 MR. GILLIGAN: I understand.

12:23:29 6 Well, there's the question of whether the statute
12:23:31 7 displaces the state secrets privilege under any circumstances.
12:23:35 8 And we think that --

12:23:36 9 THE COURT: Do I have to decide that?

12:23:38 10 MR. GILLIGAN: Not if --

12:23:39 11 THE COURT: I don't, do I?

12:23:40 12 It's under these circumstances, does it --

12:23:43 13 MR. GILLIGAN: Certainly under these circumstance.
12:23:45 14 The plaintiff's argument is that the statute applies in these
12:23:48 15 circumstances.

12:23:48 16 And our position is that even if it applied in these
12:23:52 17 circumstances, it would not displace the state secrets
12:23:55 18 privilege.

12:23:55 19 THE COURT: Why not?

12:23:56 20 MR. GILLIGAN: Because there is not a clear
12:23:58 21 statement of intent in the statute or its legislative history
12:24:03 22 to displace the state secrets privilege, which this Court
12:24:08 23 recognized in *El-Masri*, and the Fourth Circuit affirmed, is a
12:24:11 24 constitutionally based privilege that is necessary to promote
12:24:14 25 the executive's proper discharge of its responsibility under

12:24:18 1 Article II of the Constitution to provide for the national
12:24:19 2 defense.

12:24:19 3 THE COURT: Of course. *El-Masri* was a very
12:24:24 4 different case.

12:24:26 5 I didn't have to puzzle over the puzzle that you all
12:24:29 6 have presented me in *El-Masri*.

12:24:32 7 MR. GILLIGAN: There are actually some similarities
12:24:36 8 between this case and *El-Masri*, Your Honor.

12:24:38 9 But to focus --

12:24:38 10 THE COURT: I gave effect to the state secrets
12:24:42 11 privilege. That was affirmed by the Fourth Circuit. I
12:24:45 12 understand that.

12:24:45 13 MR. GILLIGAN: Yes.

12:24:45 14 THE COURT: Tell me anything else in the next minute
12:24:48 15 and a half, because I think I've heard plenty.

12:24:51 16 MR. GILLIGAN: In short, Your Honor, the state
12:24:58 17 secrets privilege is a privilege of constitutional dignity.
12:25:02 18 It is not a mere federal common law rule of evidence.

12:25:04 19 Therefore, to displace, it would require a clear
12:25:07 20 statement by Congress in the text of the statute in order to
12:25:13 21 ensure that Congress has confronted the constitutional issues
12:25:17 22 that could be raised by essentially determining to deprive the
12:25:22 23 executive of its ability to protect information that in the
12:25:22 24 interest of national security cannot be disclosed.

12:25:28 25 THE COURT: I understood what you said at the outset

12:25:30 1 to be something like the state secrets privilege is
12:25:35 2 constitutional, and then I didn't get that word.

12:25:38 3 Did you say "dignity"?

12:25:40 4 MR. GILLIGAN: It is a privilege of constitutional
12:25:43 5 dignity. I believe that is a term that Your Honor used in the
12:25:49 6 *El-Masri* case.

12:25:50 7 That being the case, a clear statement is required,
12:25:54 8 not the less rigorous standard applied for displacement of
12:25:59 9 mere rules of common law, such as common law rules of
12:26:03 10 evidence.

12:26:03 11 That is, by the way, the standard applied by the
12:26:06 12 Northern District of California in the *NSA Telcom Records*
12:26:10 13 case. It expressly refused, actually, to acknowledge the
12:26:14 14 constitutional statute of the state secrets privilege and on
12:26:18 15 that basis applied a lower standard to find displacement.

12:26:21 16 That approach to this issue cannot be reconciled
12:26:25 17 with *El-Masri*, which, again, says both this Court and the
12:26:29 18 Fourth Circuit recognized it is a privilege of constitutional
12:26:33 19 dignity requires a clear statement before it could be
12:26:37 20 displaced.

12:26:37 21 One last thing, Your Honor. On the plaintiff's
12:26:42 22 argument that no harm would come from engaging in the kind of
12:26:46 23 in camera review that they're suggesting here.

12:26:50 24 That argument cannot be reconciled with the Supreme
12:26:55 25 Court's observation in *Amnesty International*, in footnote 4 of

12:27:00 1 its opinion, that ex parte review of classified information,
12:27:03 2 in order then for a Court to make public findings about
12:27:06 3 whether a plaintiff claiming unlawful surveillance has
12:27:10 4 standing would itself be harmful to national security by
12:27:14 5 revealing who is and who hasn't been subject to government
12:27:19 6 surveillance.

12:27:19 7 Revealing whom and who hasn't been a target of
12:27:22 8 government surveillance can reveal all sorts of information
12:27:25 9 that our adversaries can use to evade surveillance and to
12:27:29 10 deprive the NSA and the government of critical foreign
12:27:33 11 intelligence information. And that is as true here, for the
12:27:35 12 reasons explained in our classified declarations, as it would
12:27:38 13 be in any other case.

12:27:39 14 And finally, Your Honor, I think it also must be
12:27:42 15 recalled. The plaintiff is not asking the Court to fashion a
12:27:45 16 rule and interpretation and approach to 1806(f) that would
12:27:49 17 apply in this case alone. They're asking for a construction
12:27:52 18 of the statute that would apply in any case where any
12:27:54 19 plaintiff comes to Court and says, "I've been subject to
12:27:58 20 surveillance and I want to use 1806(f) to find out whether I
12:28:02 21 have standing or not."

12:28:04 22 And that rule, if adopted, would apply in any case,
12:28:07 23 no matter how detrimental to national security it might be, to
12:28:13 24 reveal whether or not that particular party were subject to
12:28:13 25 government surveillance.

12:28:14 1 THE COURT: All right. Thank you.

12:28:18 2 MS. GORSKI: Your Honor, very briefly. Mr. Gilligan
12:28:24 3 is simply incorrect about the Court's approach in the *In re*
12:28:28 4 *NSA Telcoms* case. In that case, the Court acknowledged that
12:28:32 5 the states secret privilege performs a function of
12:28:32 6 constitutional significance, and it nevertheless concluded
12:28:35 7 that Section 1806(f) preempts the state secrets privilege.
12:28:40 8 That language that performs the function of constitutional
12:28:42 9 significance language is the same language that the Fourth
12:28:45 10 Circuit used in *El-Masri*.

12:28:47 11 In addition, even if a clear statement standard
12:28:51 12 applies, 1806(f) speaks clearly to the issue. It provides for
12:28:56 13 in camera review in precisely the situation presented here.

12:29:00 14 And none of the cases that the government cites
12:29:03 15 requires some kind of magic words requirement whereby in order
12:29:07 16 to displace, even if privilege of constitutional significance,
12:29:10 17 Congress would have to say explicitly, "We are displacing the
12:29:15 18 privilege."

12:29:15 19 The fact that 1806(f) prescribes specific procedures
12:29:18 20 to apply in this exact circumstance is sufficient to displace
12:29:22 21 the privilege. And in many respects, the government's
12:29:25 22 argument is perplexing because on the one hand, it seems on
12:29:28 23 the government's theory not even an individual who receives
12:29:32 24 notice of FISA surveillance can use 1806(f), but at the same
12:29:36 25 time the government does not explicitly say that 1806(f) is

12:29:40 1 unconstitutional.

12:29:40 2 I think it is notable that the government doesn't
12:29:43 3 take that position, because under the analysis in *Youngstown*,
12:29:47 4 a familiar analysis, the executive branch would lose.

12:29:50 5 This is an area in which the executive branch and
12:29:53 6 Congress have concurrent authority. The executive branch
12:29:55 7 cannot simply make a raw assertion of power. Here, Congress
12:29:59 8 has regulated. Congress has spoken clearly and directly to
12:30:02 9 the issue.

12:30:03 10 Second, Wikimedia --

12:30:06 11 THE COURT: Make it final. I don't have any more
12:30:09 12 time. Say what you need to say and say it succinctly,
12:30:16 13 quickly.

12:30:16 14 MS. GORSKI: Yes, Your Honor.

12:30:16 15 The Court in *Amnesty International* did not have the
12:30:19 16 occasion to consider Section 1806(f). Again, the Court's
12:30:23 17 ruling on standing here need not disclose any sensitive
12:30:26 18 information. But 1806(f) accommodates the government's
12:30:30 19 interest. It accounts for the fact that sensitive information
12:30:33 20 -- if sensitive information were disclosed, that that could
12:30:37 21 present an issue, and in those circumstances in camera review
12:30:41 22 is appropriate.

12:30:42 23 Thank you, Your Honor.

12:30:42 24 THE COURT: All right. Thank you.

12:30:46 25 This issue that you presented is of far-reaching

12:30:53 1 significance and importance, and I will take into account your
12:30:58 2 arguments and your briefs. It isn't simply a discovery
12:31:05 3 question. It's far more than that. It's really a
12:31:13 4 disagreement about the extent to which we allow our government
12:31:22 5 to undertake certain activities without having to disclose a
12:31:28 6 lot of information about it.

12:31:36 7 It's too bad we live in an angry world filled with
12:31:44 8 people who want to attack us and hurt us. Then we wouldn't
12:31:48 9 need an NSA, and we wouldn't need to strike this balance
12:31:52 10 between the need for our national security and the need for
12:32:00 11 the public to know what its government is doing. But we do
12:32:05 12 have to strike that balance, and I have to do that in the
12:32:09 13 first instance. I'm acutely aware of that.

12:32:14 14 Thank you.

12:32:15 15 MR. GILLIGAN: Your Honor, may I beg the Court's
12:32:21 16 indulgence to state just one more thing.

12:32:21 17 THE COURT: If you can do it in a sentence.

12:32:24 18 MR. GILLIGAN: Section 1810 of FISA, the statute
12:32:26 19 that the plaintiff relies on, a point first raised in their
12:32:29 20 reply brief, and we've not had an opportunity to address, does
12:32:33 21 not provide a cause of action against the government to begin
12:32:35 22 with so held by the Ninth Circuit in the *Al Haramain* case.

12:32:39 23 THE COURT: All right. Do this: Submit briefs.
12:32:42 24 This is Friday. You can do it by Wednesday. Submit briefs
12:32:46 25 simultaneously on that issue.

12:32:49 1 MR. GILLIGAN: Wednesday is the Fourth of July, Your
12:32:51 2 Honor.

12:32:51 3 THE COURT: All right. Yes, make it Friday, a week
12:32:56 4 from today. Simultaneous briefs on that issue alone.

12:33:04 5 MR. GILLIGAN: Thank you, Your Honor.

12:33:05 6 THE COURT: All right. I'll take a brief recess so
12:33:08 7 that the Manafort counsel can resume their places and we will
12:33:11 8 proceed with that matter.

12:33:12 9 Court stands in recess for five minutes.

12:33:44 10

11 **(Proceedings adjourned at 12:33 p.m.)**

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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motion hearing in the case of the **WIKIMEDIA FOUNDATION versus NATIONAL SECURITY AGENCY**, Civil Action No. 15-cv-662, in said court on the 29th day of June, 2018.

I further certify that the foregoing 29 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this March 27, 2020.



Tonia M. Harris, RPR
Official Court Reporter